stances creating a legal liability in some person other than the employer, to pay damages in respect thereof," the amount of compensation to which such employee is entitled shall be reduced by the amount of damages recovered from the third party; and the employer, from whom compensation was recovered, shall be entitled to indemnity from the third party and to subrogation to the employee's rights against that party. (1913 IOWA CODE SUPP., § 2477-m.6.) The plaintiff's intestate, an employee of the defendant, was injured by and in the course of his employment through a collision with a street car operated by a third party. The employee, in consideration of his covenant not to sue the third party, received from the latter the sum of $750. The employee then sued the defendant for compensation. It did not appear on the record who was at fault in causing the collision. The defendant sought to reduce compensation by the amount the employee had received from the third party. *Held*, that it cannot do so. *Renner* v. *Model Laundry, Cleaning & Dyeing Co.*, 184 N. W. 611 (Iowa).

The *ratio decidendi* is that as the defendant has not borne his burden of establishing that the third party was legally liable for the employee's injury, he has failed to lay the foundation necessary for the reduction sought. The decision is justified by the words of the statute. But the court would better have given effect to its manifest purpose, which is two-fold: (1) to entitle the employee to recover full indemnity for his injuries, but no more; and (2) as between the employer and a third party, to put the common-law damages, but no more, on the third party, if he would have been liable at common law. See *Mahomed* v. *Maunsell*, 124 L. T. 153, 1 B. W. C. C. (N. S.) 269. *Cf. Jacowicz* v. *Delaware, etc. R. R. Co.*, 87 N. J. L. 273, 92 Atl. 946. See 28 HARV. L. REV. 713. Where the employee is the recipient of a mere gratuity from the injuring party, it should not be deducted from his claim for compensation. See *Gilroy* v. *Mackie*, 46 Sc. L. Rep. 325, 2 B. W. C. C. (N. S.) 269; *Blackford* v. *Green*, 87 N. J. L. 359, 361, 94 Atl. 401, 402. *Cf. Burnand* v. *Rodocanachi*, 7 App. Cas. 333; *Castellain* v. *Preston*, 11 Q. B. D. 380, 389, 395. But where a substantial sum is received by the employee in consideration of his release of, or covenant not to sue, the injuring party, a presumption of the latter's liability would seem to be raised. Most of the few cases which have arisen under similar statutes agree that the employer is entitled to a *pro tanto* reduction. See *Page* v. *Burtwell*, [1908] 2 K. B. 758; *Mulligan* v. *Dick & Son*, 6 Sc. Sess. Cas., 5th Ser., 126, 41 Sc. L. Rep. 77; *Murray* v. *North British Ry. Co.*, 6 Sc. Sess. Cas., 5th Ser., 540, 41 Sc. L. Rep. 383; *Rosenbaum* v. *Hartford News Co.*, 92 Conn. 398, 103 Atl. 120; *Cripps's Case*, 216 Mass. 586, 588, 104 N. E. 565, 566. But see *Naert* v. *Western Union Telegraph Co.*, 206 Mich. 68, 172 N. W. 606. *Cf. Newark Paving Co.* v. *Klotz*, 85 N. J. L. 432, 91 Atl. 91, 86 N. J. L. 690, 92 Atl. 1086. See 26 HARV. L. REV. 377.

RELEASE — CONSTRUCTION AND OPERATION — RELEASE OBTAINED BY FRAUD: SUIT ON ORIGINAL CLAIM WITHOUT TENDER. — The plaintiff's intestate was injured by the defendant. He accepted a small sum and gave a release. The intestate having died as a result of the injury, the plaintiff brought this action on the original claim, and contended that the release was obtained by fraud. The plaintiff tendered at the trial repayment of the consideration for the settlement, but had made no tender before. *Held*, that the trial judge properly directed a verdict for the defendant. *Randall* v. *Port Huron, St. C. & M. C. Ry. Co.*, 184 N. W. 435 (Mich.).

The defendant agreed to pay the plaintiff a percentage of all profits accruing from the acquisition of copper properties brought to his attention by the plaintiff. The defendant obtained a release of his obligations by money settlement, and this money has not been tendered back by the plaintiff. The plaintiff brought this action on the original contract, and the defendant set up the

release. The plaintiff replied by alleging fraud in obtaining the release, and the defendant demurred. *Held*, that the demurrer be overruled. *Plews* v. *Burrage*, 274 Fed. 881 (1st Circ.).

The rule is usually stated to be that an equitable replication that a release of the plaintiff's claim was obtained by fraudulent misrepresentations is good only if tender is made before trial. *Gould* v. *Cayuga County Nat. Bank*, 86 N. Y. 75. This view is supported by the weight of authority, and is followed by the Michigan court for the purely technical reason that a release, though voidable, is not avoided until tender is made. *Riggs* v. *Home Mutual Fire Prot. Ass'n*, 61 S. C. 448, 39 S. E. 614; *Heck* v. *Missouri Pac. Ry. Co.*, 147 Fed. 775 (Circ. Ct., D. Col.); *Harley* v. *Riverside Mills*, 129 Ga. 214, 58 S. E. 711. But where the consideration is money, as distinguished from chattels, this technical rule is not properly applicable. The plaintiff should be able to maintain an action on his original claim without tender, since the court may deduct the amount of the consideration from the damages. *St. Louis & S. F. R. Co.* v. *Richards*, 23 Okla. 256, 263, 102 Pac. 92, 95; *O'Brien* v. *Chicago, etc. Ry. Co.*, 89 Iowa, 644, 57 N. W. 425. The Federal case is right in result, but is based too broadly on the ground that this is an equitable replication, and no tender is necessary in equity. That rule is true only because equity protects the defendant by a conditional decree. *Thomas* v. *Beals*, 154 Mass. 51, 27 N. E. 1004. The Federal case being at law, tender would be necessary to protect the defendant if the consideration were other than money.

SALES — IMPLIED WARRANTY OF MERCHANTABILITY — INFRINGEMENT OF TRADE-MARK RIGHTS AS A BREACH. — The plaintiffs contracted to purchase from the defendants three thousand cans of condensed milk. When the milk arrived, one thousand of the cans had labels with the word "Nissly" upon them. This was an infringement of the trade-mark rights of the Nestlé Co. To avoid conflict with the latter, the plaintiffs were forced to strip off the labels and sell the milk unlabeled. They suffered loss, and now bring this action, alleging a breach of an implied warranty of merchantability. *Held*, that the plaintiffs recover. *Niblett* v. *Confectioners Materials Co.*, 125 L. T. R. 552 (C. A.).

It seems sometimes to be tacitly assumed in discussing the section of the Sale of Goods Act (§ 14–2) involved here, or the similar section in the American Act (§ 15–2), that a breach of the implied warranty of merchantable quality is occasioned only by a defect in the physical quality of the goods. See WILLISTON, SALES, § 243. But the Acts elsewhere define quality as including "state or condition." SALE OF GOODS ACT, 56 & 57 VICT., c. 71, § 62. UNIFORM SALES ACT, § 76. The emphatic word in the section under discussion is merchantable; and whatever renders the goods unmerchantable, whether it be strictly a defect of physical quality or not, is a breach of the warranty. The principal case, upon a unique set of facts, makes this point clear.

TRUSTS FOR CHARITABLE USES — *CY-PRÈS* — LACK OF GENERAL CHARITABLE INTENT SHOWN IN WILL. — Land was devised in trust for a school for poor children; but if the trust should not take effect or should be defeated or "the precise object . . . become prevented," then in trust for the settlor, his heirs and assigns. The funds available became so meager that the school was practically derelict. The court decided that the object of the trust had "become prevented." *Held*, that the property be applied *cy-près*. *In re Peel's Release*, [1921] 2 Ch. 218.

It is firmly settled, in theory, that the *cy-près* doctrine is founded on the intention of the testator; and when it appears that he had no general charitable intent, as is evident in the principal case, the court should not apply the property *cy-près*. *In re Rymer*, [1895] 1 Ch. 19; *In re White's Trusts*, 33 Ch. Div.